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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No.....

DETWEILER BROS., INC., A CORPORATION,
Petitioner,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Supreme Court of the United States:

Detweiler Bros., Inc., a corporation, respectfully petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review a decree of said Court entered November 1, 1946 (R 73), affirming an order of the United States District Court for the District of Idaho, Southern Division, entered January 16, 1945, (R51) in a proceeding brought by the Administrator of the Wage and Hour Division, United States Department of Labor, to enforce a Subpoena Duces Tecum issued by the Administrator in

pursuance of Section 9 of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U.S.C. 201 *et seq.*).

A.

Summary Statement of the Matter Involved

Your Petitioner is an Idaho corporation, operating a retail store in Twin Falls, Idaho, wherein Petitioner sells principally household appliances and in connection therewith it has developed a general retail plumbing business and a general retail sheet metal business (R36). Incidental to its retail service, Petitioner mixes locally produced diatomacious earth with paper and sells and installs the mixture to customers as a retail insulation service (R39). It does no wholesale business whatsoever and its installation work is done solely for retail customers. All of its business is done in Twin Falls, Idaho, or in the trade area immediately around Twin Falls. It does no business in any other state whatsoever (R36). Petitioner claims and has claimed throughout the course of this controversy that it is a retail and service establishment within the meaning of Section 13 (a) (2), Fair Labor Standards Act (52 Stat. 1060, 29 U.S.C. Sec. 201).

Prior to July 17, 1944, Petitioner had refused to allow inspectors of the Wage Hour Division of the United States Department of Labor to inspect the books and records of its establishment; and on that date, Respondent, who is the Administrator of the Wage and Hour Division of the United States Department of Labor, issued a Subpoena Duces Tecum requiring the Petitioner to produce certain books and records therein specified for inspection by the agents of the Administrator (R24). The Subpoena stated,

among other things, that it was being issued for "an investigation of complaints of violations of Sections 7 (a), 11 (c), 15 (a) (1), 15 (a) (2), and 15 (a) (5), of the . . . Act." (R23) The purpose or scope of the investigation is nowhere else to be found in the Subpoena. Petitioner, upon advice of counsel, refused to obey the Subpoena; and on the 6th day of October, 1944, the Administrator applied to the United States District Court, District of Idaho, Southern Division, for an order requiring Petitioner to appear before the Administrator or one of his agents and give evidence as required by the Subpoena Duces Tecum. (R25)

In his Application to the District Court for judicial enforcement of his Subpoena, the Administrator stated in part as follows: "Since October, 1940, (Administrator) having reasonable grounds for believing the (Petitioner) was violating Sections 7, 11 (c), 5 (a) (2), and 15 (a) (5) of the Act, sought through Elbert Shaw, Clifford C. Wills, Harold E. Hilbun, and Adrian Roberts, to make an investigation of (Petitioner's) business . . ." (R5). The Administrator's Application further alleges, however: "All of the books, records, papers, documents, and memoranda required to be produced by said Subpoena were at the time of the issuance of said Subpoena and are now relevant, material, and appropriate to determine whether (Petitioner) has violated Sections 6, 7, 11 (a), 15 (a) (2), and 15 (a) (5) of the Act. . ." (R7) Thus, the allegation of relevancy of the materials sought by the Subpoena differs from the allegations of what was apparently to be covered by the scope of the investigation in that it omits two of the Sections of the Fair Labor Standards Act that had previously been named, viz. Section 15 (a)

(1) and 5 (a) (2), as well as adding another Section, viz. Section 6.

Pursuant to the Administrator's Application, the District Court ex parte issued an order to show cause why the Application should not be granted. (R25) Petitioner here, who was Respondent in that proceeding, filed an Answer alleging and Affidavits supporting its contention that it was exempt from coverage under the Act (R28-40) and appeared at the hearing offering to present further evidence on the exempt character of its establishment. Petitioner's offers of evidence were rejected, however; and although the Court found that the evidence in the Affidavits showed by a preponderance of weight that Petitioner was an exempt establishment within the meaning of Section 13 (a) (2) of the Act, (R47) the Court nevertheless made an order requiring Petitioner to appear before the Administrator and produce books and records pertaining to Petitioner's business during the period from October 24, 1940, to January 16, 1945. (R50). This order was broader than the terms of the original Subpoena, which required production of such documents for the period from October 24, 1940, to July 17, 1944, which was the date of the execution of the Subpoena by the Adiministrator. (R-27)

Petitioner appealed to the United States Circuit Court of Appeals for the Ninth Circuit. Argument on the Appeal was heard on September 23, 1946, in Portland, Oregon. On November 1, 1946, the Circuit Court affirmed the order of the District Court (R-73); on December 5, 1946, Petitioner's Petition for Re-Hearing was by the Circuit Court of Appeals denied. (R-74)

B

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, (43 Stat. 938; 28 U.S.C., Sec. 347 (a). The decree of the United States Circuit Court of Appeals to be reviewed was entered on November 1, 1946 (R-73); Petition for Re-Hearing was denied December 5, 1946 (R-74).

C

Constitutional and Statutory Provisions Involved

The constitutional provision involved in this controversy is the Fourth Amendment to the Constitution which provides as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The statutory provisions are those embraced in the Fair Labor Standards Act of 1938 (52 Stat. 1060; 29 U.S.C. Sec. 201 *et seq.*) and Section 9 of the Federal Trade Commission Act (38 Stat. 722; 15 U.S.C. 41 *et seq.*) These provisions are set forth in the Appendix at page 22 *et seq.*

D

Questions Presented

1. Whether in a proceeding instituted for the pur-

pose of compelling compliance with the commands of a Subpoena Duces Tecum, where the record does not show affirmatively the Respondent is subject to the Act, the Respondent in response to an order to show cause is barred from making the defense that it is not subject to the Act involved.

2. Whether in a proceeding instituted for the purpose of compelling compliance with the commands of a Subpoena Duces Tecum, where the Court has found that the weight of the Affidavits in the record shows that Respondent is not subject to the Act, the Court abuses its discretion by issuing an order for compliance.

3. Whether a Court may properly determine the relevancy of materials sought by a Subpoena Duces Tecum when the Application for the order enforcing the same is so ambiguous that the scope of the inquiry in which the Subpoena is to be used cannot be gathered from the Application.

4. Whether in a proceeding instituted for the purpose of compelling compliance with the commands of a Subpoena Duces Tecum the Court has jurisdiction to issue an order compelling production of more documents than were originally sought by the Subpoena.

E

Reasons Relied on for the Allowance of the Writ

1. The holding that the Administrator is entitled to an order enforcing an investigatory Subpoena without a judicial adjudication that the persons sought to be investigated are subject to the Act is in conflict with the decision of the United States Circuit Court of Ap-

peals for the Sixth Circuit in *General Tobacco & Grocery Co. v. Fleming*, 125 F 2d 596 (1942).

The facts of the cases involved in this Court's decision in *Oklahoma Press Publishing Company v. Walling*, —U. S.—, 66 Supreme Court 494, (1946) differ from the facts involved in the *General Tobacco* case and in this case in that the records in the former cases affirmatively showed that the newspapers there were engaged in interstate commerce and not otherwise exempt from the Act, while in the *General Tobacco* case there was no showing of interstate commerce and in this case a clear showing of exemption has been made. The distum in the *Oklahoma Press* case to the effect that Congress clearly intended to vest the Administrator with power to investigate persons not subject to the Act should be reconsidered particularly as it applies to retail establishments which Congress expressly said were not to be subject to the Act.

2. The District Court found that the weight of the Affidavits in the record showed that Petitioner was exempt from coverage under the Fair Labor Standards Act. Making an order for enforcement of the Subpoena despite such a finding constituted a clear abuse of discretion by the District Court and the failure of the Circuit Court of Appeals to correct this abuse of discretion was arbitrary and capricious and should be reviewed by this Court.

3. Where the scope of the Administrator's inquiry cannot be gathered from the record in the case, the Court has no issue to which the relevancy of the materials sought can be applied. The action of the Circuit

Court of Appeals in affirming an order for the production of records not shown to be relevant was arbitrary and capricious and should be reviewed by this Court.

The record in this case shows that the Administrator's Application to the District Court for enforcement of his Subpoena was ambiguous, conflicting, and self-contradictory. Such an Application presented no issue to which the character of the materials sought could be referred in testing their relevancy. Failure of the Court to determine whether the materials sought are relevant to the Administrator's purpose violates the Fourth Amendment to the Constitution of the United States.

4. The Circuit Court of Appeals by affirming the order of the District Court, which required production of more records than those sought by the Subpoena, gave judicial sanction to an order which the District Court had no jurisdiction to make and such action by the Circuit Court of Appeals should be reviewed by this Court.

The District Court does not have jurisdiction to make an order for the production of more records than those required by the Subpoena, particularly in a case where the production of such additional records was not even formally requested by the Administrator; but the District Court in this case did make such an order. Its affirmance by the Circuit Court of Appeals constitutes a jurisdictional defect which requires correction by review in this Court.

WHEREFORE, your Petitioner prays that a Writ of Certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals

for the Ninth Circuit, to the end that this cause may be reviewed and determined by this Court; that the decree of the said Circuit Court of Appeals be reversed by this Court; and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No.....

DETWEILER BROS., INC., A CORPORATION,
Petitioner,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTORARI

Preliminary Statement

I.

The opinions below, the statement of the matter involved, jurisdiction, and the questions presented appear in the Petition for a Writ of Ceritorari herein and in the irterest of brevity are incorporated here by reference.

II.

Summary of Argument

Point 1. The holding of the Circuit Court of Appeals that the Administrator is entitled to an order enforcing an investigatory Subpoena where the record does not show affirmatively that the establishment being in-

vestigated is subject to the Act is in conflict with the decision of the United States Circuit Court of Appeals for the Sixth Circuit in *General Tobacco & Grocery Co. v. Fleming*, 125 F 2nd 596 (1942).

The decision of this Court in *Oklahoma Press Publishing Company v. Walling*, —U. S.—, 66 Supreme Court 494 (1946), is not controlling here, (a) for the reason that the records in the *Oklahoma Press* case both showed affirmatively that the newspapers there involved were engaged in interstate commerce, (b) for the reason that Congress has not clearly expressed the intent that the Administrator should have the right to make investigation of establishments not covered by the Act, and (c) for the reason that the exemption from coverage granted to retail and service establishments was not involved in the *Oklahoma Press* case, as it is in this case.

There is no language in the Fair Labor Standards Act indicating an intent of Congress to subject every corner-grocery store proprietor and every small shop keeper in America to the arbitrary will of the Administrator demanding any and all records and papers relating to wages, hours, purchases and sales of goods, which, of course, constitute the major part of any shop keeper's business records. There is language in the Act indicating that Congress intended that this class of employers should be free from the provisions of the Act.

Point 2. Even assuming that the Court had authority ~~to~~ or order production of documents without an affirmative showing of coverage, it was, nevertheless, an abuse of judicial discretion to order such

production at a time when the record before the Court showed by a preponderance of evidence that Petitioner here was not subject to the Act.

Point 3. Before giving judicial sanction to an investigatory Subpoena, the Court at least should have determined whether the materials sought were relevant to the investigation. In view of the ambiguity of the Administrator's Application with respect to the scope of his proposed investigation, it was impossible for the Court to determine to what issue the materials sought were supposed to be relevant.

Point 4. The statute conferring jurisdiction on the District Court to issue orders enforcing administrative Subpoenas does not give the Court jurisdiction to make an order requiring the production of more materials than were originally sought in the Subpoena, particularly in a case where the Administrator himself has not applied to the Court for so broad an order.

III.

Argument

Point 1

The holding of the Circuit Court of Appeals that the Administrator is entitled to an order enforcing an investigatory Subpoena without a judicial determination that the person sought to be investigated is subject to the Act is in conflict with the decision of the United States Circuit Court of Appeals for the Sixth Circuit in General Tobacco and Grocery Co. v. Fleming, supra.

Section 11 (a) of the Fair Labor Standards Act provides in part, as follows:

> "The Administrator or his designated representative may investigate and gather data regarding the wages, hours and other conditions and practices of employment in any industry subject to this Act and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act."

This Court held in the *Oklahoma Press* case that the above quoted Section authorized two classes of investigation and further held that for the second class of investigation, namely, specific investigations for violations of the Act, the use of the Subpoena power and its enforcement by the District Court could be made without a showing of coverage ((66 Supreme Court 494 at 501). It is respectfully submitted that this interpretation of the statute was dictum and not necessary to the decisions of that case for the reason that the Court further found that the Administrator's showing, including the facts supplied by the response, was sufficient to establish coverage itself (66 Supreme Court 494 at 509).

It is further submitted that the dictum to the effect that the District Court may enforce the Subpoena power without a showing of coverage in enforcement investigations, should be reconsidered by this Court. It is respectfully submitted that the Congressional

intent expressed in the Section quoted above is not couched in "the most explicit language" but is subject to a substantial degree of ambiguity as to whether the phrase, "any industry subject to this Act," is applicable to the clauses covering both general and specific investigations. Certainly, the learned Justices of the Circuit Court of Appeals for the Sixth Circuit did not find this language of Congress explicit when they decided the *General Tobacco* case; and we quote their comments in two short paragraphs, as follows:

> "The Administrator contends that, while in the first clause of the compound sentence in the first clause of Sec. 11 (a) above quoted, the words "industry subject to this Act (sections 201-219 of this title)" are used, there is no such limitation in the second clause of the sentence and that, therefore, the Administrator has been accorded visitorial and inquisitorial power over all industry, to determine whether any person has violated any provision of the Act, or for the purpose of aiding the enforcement of the provisions of the Act.
>
> "To adopt this *strained construction* would extend the sweep of his inquisitorial power *beyond the apparent intention of Congress*, as evidenced by the repeated limitations of the applicability of the Act to those subject to its provisions. An Administrator must restrain himself within the bounds of his delegated authority. It is unreasonable to assume that Congress intended that one who, when called upon to produce his books and records, denies that he is engaged in transactions

> within the purview of the Act should be refused a hearing upon that issue before his privacy is invaded in derogation of his individual immunity from unreasonable search of his papers and effects." (125 F 2d 596 at 599). (Emphasis supplied)

The Administrator himself, in his Application to the Lower Court in this case alleged (R4) the coverage of the Petitioner as if believing the same were material but he now denies that a material issue was raised by the traverse of that allegation. The Circuit Court of Appeals skirted this issue by holding that a denial of all the material allegations of the Administrator's Application raised no issue but that "the prayer of the Application for an order enforcing compliance with the Subpoena raised the one real and material issue which was decisive of the problem presented to the Court." (R71). We are thus confronted with an anomalous procedure whereby legal issues are raised not upon material allegations of a pleading but upon the prayer of the pleading, with the resultant implication that all the allegations of the pleading were mere surplusage. Surely, it was not the intent of Congress that this condition of affairs should obtain.

On the other hand, the Congressional intent to exempt retailers from coverage under the Act is plainly expressed in Section 13 (a) (2) of the Act. In this respect, this case is stronger than either the *Oklahoma Press* case or the *General Tobacco* case for the reason that no specific exemptions granted by the statute were involved in either of those two proceedings. It is respectively submitted that the intent of Congress to exempt the local retailers from coverage under the Act

cannot be given its full effect if the Subpoena power of the Administrator is given the almost unlimited scope implied by the language of the *Oklahoma Press Case.*

Point 2. *Even assuming that the Court had authority to order production of documents without an affirmative showing of coverage, it was, nevertheless, an abuse of judicial discretion to order such production at a time when the record before the Court showed by a preponderance of evidence that the Petitioner here was not subject to the Act.*

The power of the District Court to order compliance with the Administrator's Subpoena finds its source in the following language contained in Section 9 of the Federal Trade Commission Act which is incorporated by reference in Section 9 of the Fair Labor Standards Act:

> "Any of the District Courts of the United States within the jurisdiction of which such inquiry is carried on may in case of contumacy or refusal to obey a Subpoena . . . issue an order requiring such corporation or other person to appear . . . or produce documentary evidence . . . and any failure to obey such order of the Court may be punished by the Court as a contempt thereof."

By the use of the word *may* instead of *shall,* this power of the Court is clearly discretionary and not mandatory. *Oklahoma Press Pub. Co. v. Walling, Supra, Footnote* 57, 66 *Supreme Court,* 509.

In this case, the Lower Court refused to exercise any

discretion whatsoever. The Court found, "The weight of the Affidavits are in favor of the Respondent . . . (Petitioner here)," (R 47). Notwithstanding this fact, however, the Court refused to exercise any discretion in the matter and held, "I am convinced the only purpose of the hearing before this Court is to obtain an order, the disobedience of which would place the Respondent in contempt of this Court's authority, and it is the conclusion of this Court that such an order should issue" (R49). It thus appears that the orbit of the Court's discretionary powers has in this instance been reduced to the vanishing point.

Point 3. *Before giving judicial sanction to an investigatory Subpoena, the Court at least should have determined whether the materials sought were relevant to the investigation. In view of the ambiguity of the Administrator's Application with respect to the scope of his proposed investigation, it was impossible for the Court to determine to what issue the materials sought were supposed to be relevant.*

Under any theory of this case the Court below had the duty to determine whether the materials whose production was sought were relevant to the questions that were purported to be investigated (*Oklahoma Press Pub. Co. v. Walling, supra,* Footnote 57,66 Supreme Court 509).

These questions must necessarily be presented to the Court by the Administrator. The Administrator's Application particularly in paragraphs VI (R5) and X (R7), presents conflicting statements as to what the scope of the Administrator's investigation purports to be. The Administrator alleged in paragrph VI (R5) that he had reasonable grounds for believing that Peti-

tioner here was violating Sections 7, 11 (c), 15 (a) (2), and 15 (a) (5) of the Act and then alleged in paragraph X (R7) that the materials sought by the Subpoena were relevant to determine whether Petitioner had violated Sections 6, 7, 11 (c), 15 (a) (2), and 15 (a) (5) of the Act. The question at once arises as to which list of Sections the test of relevancy should be applied. The District Court, as above stated, merely said that an order should issue. The Circuit Court of Appeals refused to pass on the issue as to whether the Administrator had made definite the scope of his inquiry (R68) and put a premium on ambiguity and indefiniteness by a general holding that, "All of the materials whose production is required by the order of the District Court appear to be relevant to the inquiry of whether or not the Fair Labor Standards Act has been violated." (R69).

The Courts cannot adequately protect the rather important rights secured by the Fourth Amendment if Administrative procedures are allowed to become as slipshod as the record in this case indicates. Inexactness can often be a shield for bad faith; and as the Administrator approaches the field of the citizen's guaranteed right of privacy, the strictness of his accountability for his actions should be raised to a correspondingly high degree.

Point 4. *The statute conferring jurisdiction on the District Courts to issue orders enforcing administrative Subpoenas does not gives the Court jurisdiction to make an order requiring the production of more materials than were originally sought in the Subpoena, particularly in a case where the Administrator himself has not applied to the Court for so broad an order.*

The order of the District Court in this case required the Petitioner here to produce documents, "as is required by the aforesaid Subpoena Duces Tecum of the Administrator . . ." (R50). The Subpoena Duces Tecum required production of Petitioner's records covering a period generally, "from October 24, 1940, to date" (R23), and the Subpoena was dated July 17, 1944.

The order of the District Court, however, in describing the documents to be produced by Petitioner here generally described said documents as records relating to the period "from October 24, 1940, to date" R(50). The date of the order was January 16, 1945. It thus appears that the Petitioner's records for the period between July 17, 1944, and January 16, 1945, while not required by the Subpoena were, nevertheless, required by the Court's order.

The jurisdiction of the Court to issue an order in a proceeding of this kind is found in the following paragraph in Section 9 of the Federal Trade Commission Act.

> "Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

Substantially similar provisions are found in Section 12 of the Interstate Commerce Act (49 U.S.C. Section 12), in Section 307 (a) of the Federal Power Act (16 U. S. C., Sec. 825 f), Section 11 of the National Labor Relations Act (29 U.S.C., Sec. 161) and Section 22 of the Securities Act of 1933 (15 U. S. C., Sec. 77v). We have been able to discover no judicial construction of the above cited statutory provisions which determine the extent of the judicial authority to enlarge the scope of Administrative Subpoena. It is apparent, however, from the record in this case that the Administrator in his Application prayed that the Petitioner should be required to produce documentary evidence, "as required by said Subpoena Duces Tecum," (R8), and that the Circuit Court of Appeals, although it affirmed the District Court's order, considered that the prayer in the Application, "was for the enforcement of the Subpoena and not for enforcement of some other form of relief." (R70). It is, therefore, submitted that both by virtue of the pleadings in this case and by virtue of the limitations in the statutes conferring jurisdiction on the Court in this proceeding, the Court did not have power to order production of records other than those specified in the Administrator's Subpoena.

IV

Conclusion

It is respectfully submitted that this Petition for a Writ of Certiorari should be granted to correct the dictum contained in the *Oklahoma Press Publishing* case; or if that dictum is to be followed, the Court should, nevertheless, grant this Writ to correct the procedural errors in this record and establish an orderly, and fair procedure by which the acts of the

Administrator can be made properly subject to judicial scrutiny.

Respectfully submitted,

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APPENDIX

Statutory Provisions Involved

The statutory provisions involved are those embraced in the Fair Labor Standards Act of 1938 (52 Stat. 1060; 29 U. S. C., Sec. 201 *et seq.*), which is herein set forth below; and in Section 9 of the Federal Trade Commission Act (38 Stat. 722; 15 U. S. C., Sec. 41 *et seq.*), which is herein set forth below, following the Fair Labor Standards Act.

"Fair Labor Standards Act"

[PUBLIC—NO. 718—75TH CONGRESS]

[CHAPTER 676—3D SESSION]

[S. 2475]

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938".

Finding and Declaration of Policy

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of good for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2)

burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to elimate the conditions above referred to in such industrices with substantially curtailing employment or earning power.

Definitions

SEC. 3 As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(c) "State" means any State of the United States or the Distrct of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of office or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production

of good if such employee was employed in producing, manufacturing, mining handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying that such person is above the oppressive child-labor age. The Chief of the Children's Bureau shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years inoccupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent

that the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.

Administrator

SEC. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $10,000 a year.

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject

to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duty authorized representative may exercise any or all of his powers in any place.

(d) The Administrator shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable.

Industry Committees

SEC. 5 (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce.

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In

the appointment of the persons representing each group, the Administrator shall give due regard to the geopraphical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee, and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

(e) No industry committee appointed under subsection (a) of this section shall have any power to recommend the minimum rate or rates of wages to be paid under section 6 to any employees in Puerto Rico or in the Virgin Islands. Notwithstanding any other provision of this Act, the Administrator may appoint a special industry committee to recommend

the minimum rate or rates of wages to be paid under section 6 to all employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce in particular industries. An industry committee under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages to be paid, and in determining classifications, such industry committees and the Administrator shall be subpect to the provisions of section 8 and no such committee shall recommend, nor shall the Administrator approve, a minimum wage rate which will give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.

No wage orders issued by the Administrator pursuant to the recommendations of an industry committee made prior to the enactment of this joint resolution pursuant to section 8 of the Fair Labor Standards Act of 1938 shall after such enactment be applicable with respect to any employees engaged in commerce or in the production of good for commerce in Puerto Rico or the Virgin Islands.*

*Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

Minimum Wages

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cent an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8,

(5) if such employee is a home worker in Puerto Rico or the Virgin Island, not less than the minimum piece rate prescribed by regulation or order; if no much mimimum piece rate is in effect, any piece rate adopted by such employer shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall

have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and porcedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers.*

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

(c) The provisions of paragraphs (1), (2), and (3) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and insofar as such employee is covered by a wage order issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 5 (e).*

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*Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

Maximum Hours

SEC 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks.

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relation Board, which provides that the employee shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugar cane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, with the area of production (as defined by the Administrator), or any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of sub-

section (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

Wage Orders

SEC. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committe shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

(b) Upan the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any autherized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it deter-

mines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

(c) The industry committee for any industry shall recommend such reasonable classification with any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classication in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily

maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Administrator a report containing its recommendations with hespect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approved and carry into effect the recommendations contained in such report, if he finds that the recommendations are in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purpose of this section; otherwise he shall disapprove such recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry committee for such industry (which he may appoint for such purpose), for further consideration and recommendation.

(e) No order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent

substantial curtailment of employment in the industry.

(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purpose of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance.

(g) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons.

Attendance of Witnesses

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of section 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers and duties of the Administrator, the Chief of Children's Bureau, and the industry committees.

Court Review

SEC. 10. (a) Any person aggrieved by an order of the Administrator issued under section 8 may obtain

a review of such order in the circuit court of appeals of the United States for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon the Administrator, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the petitioner. The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be added upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings by reason of the additional evidence so taken,

and shall file with the court such modified or new finding which if supported by substantial evidence shall also his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28 secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment of the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually received while such stay is in effect.

Investigations, Inspections, and Records

SEC. 11. (a) The Administrator or his designated representative may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry sub ject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may

aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigation and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Chief of the Children's Bureau may, for the purpose of carrying out their respective function and duties under this Act, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

Child Labor Provisions

SEC. 12. (a) After the expiration of one hundred and twenty days from the date of enactment of this

Act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any such goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Chief of the Children's Bureau in the Department of Labor, or any of his authorized representatives, shall make all investigation and inspections under section 11 (a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

Exemptions

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as seaman; or (4) any employee of a carrier by air

subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or byproducts thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations.[1]

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to estab-

lish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employe of an employer subject to the provisions of Part I of the Interstate Commerce Act.

(c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while not legally required to attend school, or to any child employed as an actor in motion pictures or theatrical productions.

Learners, Apprentices, and Handicapped Workers

SEC. 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates.

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*Amendment provided by Act of August 9, 1939 (Public No. 334, 76th Congress. 53 Stat. 1266).

Prohibited Acts

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11

(c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a) (1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

Penalties

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees

similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

Injunction Proceedings

SEC. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

Relation to Other Laws

SEC. 18. No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

Separability of Provisions

SEC. 19. If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Approved, June 25, 1938.

FEDERAL TRADE COMMISSION ACT, SECTION 9

"SEC. 9. For the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesess and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

"Any of the district courts of the United States within the jurisdiction of which such inquiry is carried

on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as contempt thereof.

"Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of the Act or any order of the commission made in pursuance thereof.

"The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

"Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking

the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

"No person shall be excused from attending the testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him oh subject him to penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided*, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying."

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728946—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 855

DETWEILER BROS., INC., A CORPORATION, PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 46–49) is reported at 58 F. Supp. 201. The opinion of the Circuit Court of Appeals (R. 66–72) is reported at 157 F. 2d 841.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 1, 1946 (R. 73). A petition for rehearing was denied on December 5, 1946 (R. 74). The petition for certiorari was filed on January 6, 1947. The jurisdiction of this

Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether the District Court had power to order compliance with a subpoena duces tecum issued by the Administrator of the Wage and Hour Division, without a prior determination that petitioner is subject to the Fair Labor Standards Act.

2. Whether the District Court properly ordered petitioner to produce records relevant to coverage and to violations of the Act.

STATUTES INVOLVED

The statutory provisions involved are Sections 9 and 11 (a) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. sec. 201, and Section 9 of the Federal Trade Commission Act, 38 Stat. 717, 15 U. S. C. 49. These provisions are set forth in the Appendix.

STATEMENT

After petitioner's refusal to permit inspectors of the Wage and Hour Division to examine its records for the purpose of determining whether it was violating the Fair Labor Standards Act (R. 9–19, 21–22), petitioner's president was served with a subpoena duces tecum signed by the Administrator of the Division, calling for the production of petitioner's records from October 24, 1940, to the date of the subpoena, relating to (1)

the wages paid to and hours worked by its employees, (2) the interstate aspects of its business, and (3) its retail or non-retail character (R. 23–24). Following petitioner's refusal to comply with the subpoena (R. 20–21), the Administrator in October 1944 applied to the District Court for an enforcement order, alleging that the records requested were "relevant, material and appropriate to determine whether [petitioner] has violated * * * the Act" (R. 7).

In response to an order to show cause (R. 25–27), petitioner denied that it was covered by the Act and urged that it was exempt as a retail establishment (R. 30–31). The Division's inspector filed an answering affidavit alleging on information and belief facts contravening the company's contentions (R. 42–43). The District Court ordered production of the records specified in the subpoena from October 24, 1940, to the date of the order (R. 49–51). The Circuit Court of Appeals for the Ninth Circuit affirmed (R. 72).

ARGUMENT

No questions of substance are presented which have not already been settled by *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, approving judicial enforcement of subpoenas substantially identical to that here involved. (R. 23–24; compare 327 U. S. at 210, n. 46, which sets forth the text of one of the subpoenas then before this Court.) It was there held that records similar to

those sought here are relevant to the investigations authorized by the Act, and that they may be obtained without a prior showing that the employer is subject to the wage and hour requirements of the Act. 327 U. S. at 210, 214, 216–217, especially notes 46–48 and 57.

Petitioner relies on four reasons for the allowance of the writ (Pet. 6–8).

(1) The first of these, conflict with *General Tobacco & Grocery Co.* v. *Fleming*, 125 F. 2d 596 (C. C. A. 6), was the reason assigned by this Court for granting certiorari in the *Oklahoma Press* case, 327 U. S. at 192, n. 5; and the decision in the latter case effectively resolved the conflict with the *General Tobacco* case.

(2) The second reason is that the District Court abused its discretion by ordering that the subpoena be enforced, even though it was of the view that "The weight of the affidavits are in favor of the respondent [the employer]" (R. 47). That questions of coverage or exemption are not before a district court in dealing with an application by the Administrator for the enforcement of a subpoena is expressly held in the *Oklahoma Press* case, 327 U. S. at 214, 217, n. 57. Moreover, the District Court's observations in this respect seem to have been based simply upon the fact that the Administrator's affidavit was on information and belief, while the company's affidavits were "positive" (R. 47).

(3) The third reason is based on a supposed ambiguity in the Administrator's application to the District Court. One paragraph of the application stated that the investigation for which the records were sought was to determine whether there were violations of Sections 7, 11 (c), 15 (a) (2), and 15 (a) (5), while another paragraph added Section 6 (the minimum wage section) to the list. Inasmuch as the same pay-roll records would be required to determine minimum wage violations under Section 6 as would be required to determine overtime violations under Section 7, the basis for petitioner's complaint on this score is difficult to perceive.

(4) The final reason is drawn from the fact that the order of the District Court required production of petitioner's records from October 24, 1940, "to date", and was dated on the day of its entry, which was of course subsequent to the date of the subpoena. Hence, argues petitioner, the District Court's order required the production of records not called for by the subpoena, which similarly required production of records "to date". We believe the argument contains its own refutation. In any event, it may be noted that the application specifically requested not only enforcement of the subpoena but also "such other and further relief as may be necessary and appropriate" (R. 8). The order of the District Court was undoubtedly responsive to the applica-

tion since records to the most recent date are appropriate to accomplish the purpose of the Administrator's investigation. Moreover, the contention is raised here for the first time. *McCullough* v. *Kammerer Corp.*, 323 U. S. 327.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

GEORGE T. WASHINGTON,
Acting Solicitor General.

WILLIAM S. TYSON,
Solicitor,
United States Department of Labor.

JANUARY 1947.

APPENDIX

Fair Labor Standards Act, c. 676, 52 Stat. 1060 U. S. C. 201):

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

* * * * *

SEC. 11 (a). The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections neces-

sary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

Federal Trade Commission Act, 38 Stat. 717 (15 U. S. C. 49):

SEC. 9.

* * * * * * *

* * * in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

U. S. GOVERNMENT PRINTING OFFICE: 1947